

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
8 WESTERN DIVISION
9

10 DANNY CASTRO,) No. EDCV 08-1151 JVS (FFM)
11 Petitioner,)
12 v.) ORDER RE SUMMARY
13 LARRY SMALL,) DISMISSAL OF ACTION WITHOUT
14 Respondent.) PREJUDICE
15 _____)

16 Petitioner filed the instant Petition for Writ of Habeas Corpus by a Person
17 in State Custody ("Pet.") on August 27, 2008. The petition challenges petitioner's
18 conviction for first degree murder on the ground that allegedly irrelevant evidence
19 as to shot gun shells, marijuana, and petitioner's prior possession of a gun was
20 introduced into evidence. Petitioner does not state any federal basis for his
21 contention.

22 As a matter of comity, a federal court will not entertain a habeas corpus
23 petition unless the petitioner has exhausted the available state judicial remedies on
24 every ground presented in the petition. *Rose v. Lundy*, 455 U.S. 509, 518-22, 102
25 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). The habeas statute now explicitly provides
26 that a habeas petition brought by a person in state custody "shall not be granted
27 unless it appears that -- (A) the applicant has exhausted the remedies available in
28 the courts of the State; or (B)(i) there is an absence of available State

1 corrective process; or (ii) circumstances exist that render such process ineffective
2 to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1). Moreover, if the
3 exhaustion requirement is to be waived, it must be waived expressly by the State,
4 through counsel. *See* 28 U.S.C. § 2254(b)(3).

5 Exhaustion requires that the prisoner’s contentions be fairly presented to the
6 state courts, and be disposed of on the merits by the highest court of the state.
7 *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). A claim has not been fairly
8 presented unless the prisoner has described in the state court proceedings both the
9 operative facts and the federal legal theory on which his claim is based. *See*
10 *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865
11 (1995); *Picard v. Connor*, 404 U.S. 270, 275-78, 92 S. Ct. 509, 30 L. Ed. 2d 438
12 (1971); *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996). A federal court may
13 raise the failure to exhaust issue *sua sponte* and may summarily dismiss on that
14 ground. *See Stone v. San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992);
15 *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam); *see also*
16 *Granberry v. Greer*, 481 U.S. 129, 134-35, 107 S. Ct. 1671, 95 L. Ed. 2d 119
17 (1987).

18 Petitioner has the burden of demonstrating that he has exhausted available
19 state remedies. *See, e.g., Brown v. Cuyler*, 669 F.2d 155, 158 (3d Cir. 1982).
20 Here, it plainly appears from the face of the petition that petitioner cannot meet
21 this burden with respect to the claim being alleged by him. Although petitioner
22 states that he raised the ground asserted herein in his appeal, it is clear from his
23 filing that he did not raise this claim in his petition for review to the California
24 Supreme Court. In this regard, petitioner has attached a copy of his brief in
25 support of his petition for review in the California Supreme Court. The issue
26 raised in that brief is whether the state had introduced sufficient evidence of
27 premeditation and deliberation to sustain the conviction for first degree murder.
28 No issue regarding the propriety of introducing evidence of shot gun shells,

1 marijuana, or prior gun possession is mentioned in the filings. Thus, petitioner's
2 instant claims are unexhausted.

3 If indeed it were clear that the California Supreme Court would hold that
4 petitioner's unexhausted federal constitutional claim was procedurally barred
5 under state law, then the exhaustion requirement would be satisfied.¹ *See Castille*
6 *v. Peoples*, 489 U.S. 346, 351-52, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989);
7 *Johnson v. Zenon*, 88 F.3d at 831; *Jennison v. Goldsmith*, 940 F. 2d 1308, 1312
8 (9th Cir. 1991). However, it is not "clear" here that the California Supreme Court
9 will hold that petitioner's federal constitutional claim is procedurally barred under
10 state law. *See, e.g., In re Harris*, 5 Cal. 4th 813, 825 (1993) (granting habeas
11 relief where petitioner claimed sentencing error, even though the alleged
12 sentencing error could have been raised on direct appeal); *People v. Sorensen*, 111
13 Cal. App. 2d 404, 405 (1952) (noting that claims that fundamental constitutional
14 rights have been violated may be raised by state habeas petition). The Court
15 therefore concludes that this is not an appropriate case for invocation of either
16 exception cited above to the requirement that a petitioner's federal claim must first
17 be fairly presented to and disposed of on the merits by the state's highest court.

18
19
20
21
22
23
24 ¹ In that event, although the exhaustion impediment to consideration of petitioner's
25 claim on the merits would be removed, federal habeas review of the claim would
26 still be barred unless petitioner could demonstrate "cause" for the default and
27 "actual prejudice" as a result of the alleged violation of federal law, or demonstrate
28 that failure to consider the claim would result in a "fundamental miscarriage of
justice." *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L.
Ed. 2d 640 (1991).

1 IT THEREFORE IS ORDERED that this action be summarily dismissed
2 without prejudice, pursuant to Rule 4 of the Rules Governing Section 2254 Cases
3 in the United States District Courts.

4 LET JUDGEMENT BE ENTERED ACCORDINGLY.

5
6
7 DATED: October 6, 2008



JAMES V. SELNA
United States District Judge

8
9
10 Presented by:

11
12 /S/ FREDERICK F. MUMM

13 FREDERICK F. MUMM
14 United States Magistrate Judge